In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-280

ARTHUR T. BRAMBLE, PETITIONER

v.

WILLIAM B. SAXBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioner brought this action in the United States District Court for the District of Colorado, requesting declaratory and injunctive relief against enforcement of 21 U.S.C. 881, which provides, *inter alia,* for the forfeiture of vehicles used in the unlawful transportation of controlled substances. A three-judge district court was convened pursuant to 28 U.S.C. 2282 and 2284, but that court determined (Pet. App. C) that the complaint did not present a substantial constitutional question and therefore ordered the case submitted to a single-judge district court. The single-judge district court held (Pet. App. B) that the forfeiture statute is constitutional, and the court of appeals affirmed (Pet. App. A).

Petitioner's contention here is that the statute denies due process by shifting the burden of proof to the private claimant upon the government's showing of probable cause to believe that the vehicle had been unlawfully used to transport a controlled substance.

The action arose out of the seizure of petitioner's automobile by agents of the Bureau of Narcotics and Dangerous Drugs on the ground that it had been used to transport a controlled substance, in violation of 21 U.S.C. 881.[1] That statute provides that such seizures are governed by the laws "relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws." 21 U.S.C. 881(d). Those laws, in turn, provide that where, as here, the value of the vehicle seized does not exceed $2500, its owner (or other claimant) may have his claim judicially determined in a forfeiture proceeding by filing a claim and posting a $250 bond within 20 days from the date of the first publication of notice of seizure. See 19 U.S.C. 1606, 1607, and 1608.

Petitioner failed to file a claim and post bond within the requisite 20-day period. Accordingly, the automobile was summarily forfeited pursuant to 19 U.S.C. 1609. Petitioner subsequently filed a petition for remission or mitigation of the forfeiture pursuant to 19 U.S.C. 1618, but the petition was denied. Petitioner then instituted this action.

1. Petitioner's argument is that the statutory scheme governing judicial forfeiture proceedings is constitutionally defective because it shifts the burden of proof to the private claimant upon the government's showing of probable cause. See 19 U.S.C. 1615. Even if this argument were correct -- and we show below (pp. 3-4, *infra*) that it is not

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[1]At the time, petitioner was under arrest on state charges of possessing marijuana with intent to distribute. Those charges were subsequently dismissed.

– petitioner would not be entitled to the return of his automobile. His automobile was summarily forfeited due to his failure to file a claim and post bond. Because of this failure, he was not entitled to receive, and did not receive, a judicial determination of forfeiture.[2] Accordingly, the constitutional propriety of the standard and burden of proof applicable in judicial forfeiture proceedings cannot affect the validity of the forfeiture of petitioner's automobile. Petitioner therefore lacks standing to raise the question he presents here.[3]

2. Petitioner's contention is, in any event, without merit. His argument is based upon the erroneous premise that forfeiture under 21 U.S.C. 881 is a criminal proceeding constitutionally requiring proof of a criminal violation beyond a reasonable doubt. But although this Court has held that forfeitures implicate constitutional protections against unreasonable searches and seizures and compelled self-incrimination (see *Boyd* v. *United States,* 116 U.S. 616; *Lees* v. *United States,* 150 U.S. 476; *United States* v. *United States Coin & Currency,* 401 U.S. 715), the Court also has

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[2]Unlike appellants in *Lee* v. *Thornton,* appeal pending, No. 73-7006, petitioner does not contest the validity of the filing and bond requirements of 19 U.S.C. 1608.

[3]Moreover, the statutes relied upon by petitioner for jurisdiction in the district court – the Tucker Act and the Administrative Procedure Act – are inapplicable. The Tucker Act does not confer jurisdiction on the district courts to entertain suits for injunctive or declaratory relief. See *Richardson* v. *Morris,* 409 U.S. 464; *United States* v. *Sherwood,* 312 U.S. 584. And the Administrative Procedure Act, in our view, does not independently grant jurisdiction but provides only a method of review in cases where jurisdiction otherwise exists. But compare *Bramblett* v. *Desobry,* 490 F.2d 405 (C.A. 6), certiorari denied, October 14, 1974, No. 73-1501, *Zimmerman* v. *United States,* 422 F.2d 326 (C.A. 3), certiorari denied, 399 U.S. 911, and *Ove Gustavsson Contracting Co.* v. *Floete,* 278 F.2d 912 (C.A. 2), certiorari denied, 364 U.S. 894, with *Bradley* v. *Weinberger,* 483 F.2d 410 (C.A. 1), and *Brandt* v. *Hickel,* 427 F.2d 53 (C.A. 9).

held that the standard of proof in civil actions to enforce a monetary penalty for the commission of a criminal act is one of "a reasonable preponderance of the evidence" (*United States* v. *Regan*, 232 U.S. 37, 48) and has indicated its approval of the use of that standard in judicial forfeiture proceedings conducted under the statutes here in question. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, No. 73-157, decided May 15, 1974 (slip op. pp. 25-26 and n. 27); *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232, 235.

A forfeiture proceeding is not a criminal prosecution of the property owner. Property becomes forfeitable not because of offenses committed by the owner but due to unlawful use of the property, whether by the owner or a third party. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*. Forfeiture therefore merely accomplishes the removal of criminal instrumentalities, not the punishment of the criminal. It has, therefore, long been considered and treated as a civil matter for purposes of the standard of proof. *One Lot Emerald Cut Stones* v. *United States*, *supra*. Placing the burden of proof upon the claimant is an appropriate means of giving effect to the presumption of validity that generally attaches to administrative actions, and it is especially appropriate where, as here, the initial burden is placed upon the government to come forward with proof of probable cause to believe that the property is forfeitable.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[4]Petitioner complains that it is unfair to place the burden of proof upon him, because that burden impairs his privilege to refuse to give self-incriminating testimony concerning the use of the automobile. But as the district court properly pointed out (Pet. App. B, pp. 43-46), although a forfeiture cannot be based upon an assertion of the Fifth Amendment privilege (see *United States* v. *United States Coin & Currency*, *supra*), neither can the assertion of the privilege be used affirmatively to defeat an otherwise valid forfeiture.